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February 14, 1997

BY HAND

Mary Ann Bumgarner, Esquire
Anne A. Weissenborn, Esquire
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4594 - China Airlines, Ltd.

FEB 14 4 13 PM '97

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Dear Ms. Bumgarner and Ms. Weissenborn:

This letter responds to your December 6, 1996 "reason to believe" letter to our client China Airlines, Ltd. ("CAL") regarding an alleged violation of 2 U.S.C. §441e resulting from below-market rental of office space in Honolulu. For the reasons stated below, CAL submits that it has not made impermissible campaign contributions and asks that the Commission take no further action and close the file regarding CAL in this matter. Should the Commission not take this course of action, CAL renews the request it made in writing on January 13, 1997, for pre-probable cause conciliation pursuant to 2 U.S.C. §437g(4) and 11 C.F.R. §111.18(d).

I. CAL Has Never Owned the Chinatown Cultural Plaza.

CAL does not now have, nor has it ever had, an ownership interest in the Chinatown Cultural Plaza ("Cultural Plaza"). It is not a parent or subsidiary of an owner of the Cultural Plaza. CAL did not construct the Cultural Plaza and has never managed it. CAL does not have, nor has it ever had, a financial or other corporate ownership interest in the Cultural Plaza.

We understand that the Cultural Plaza was built in the late 1970s by the Chinese-American community in Honolulu to serve as a meeting place for citizens and to house various civic and ethnic public interest organizations. After construction, the organizers experienced financial problems and the Cultural Plaza was taken over by Longevity Enterprises International Corporation ("Longevity"), which leased the space to a mix of commercial and civic ventures. Over the years, CAL, which had experience in ownership and management of a hotel in Honolulu and a civic interest in assisting the Chinese-American community there, seconded some employees to Longevity. These seconded individuals became employees of Longevity -- they were paid, supervised, and managed entirely by Longevity. CAL had no involvement in the corporate decisions or functioning of Longevity, or in the leasing of space within the Cultural Plaza.

On this basis alone, the Commission should take no further action against CAL. Additionally, as set forth below, other factors also compel the Commission to close this investigation.

II. The Statute of Limitations Bars this Claim.

The alleged violation the Commission here investigates is based on a rental arrangement established approximately 16 years ago. Because the applicable statute of limitations bars as untimely claims arising more than five years before the FEC brings an action for civil penalty, this claim is barred.

While the FECA itself does not contain an explicit statute of limitations for bringing civil actions, courts considering the issue agree that 28 U.S.C. §2462, the federal "default" statute of limitations, applies to actions brought by the FEC for civil penalties. FEC v. Williams, -- F.3d --, 1996 WL 734772 (9th Cir. 1996); FEC v. National Republican Senatorial Committee, 877 F.Supp. 15 (D.D.C. 1995) ("NRSC"); FEC v. National Right to Work Committee, Inc., 916 F.Supp. 10 (D.D.C. 1996) ("NRTWC"). That statute reads:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . .

28 U.S.C. §2462

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Under the statute, claims accrue at the time of the alleged offense. Williams, 1996 WL 734772 at *3 (holding the "discovery of violation rule" inapplicable); NRSC, 877 F.Supp. at 20; NRTWC, 916 F.Supp. at 13-14. Here, the alleged offense occurred in the early 1980s when Mr. Fasi first leased space in the Cultural Plaza. The terms of that leasing arrangement were not renegotiated after expiration of the lease but simply continued on a month-to-month basis for the remainder of his tenancy. Because all of the elements of the Commission's putative cause of action were present when the terms of the rental agreement between Mr. Fasi and the Cultural Plaza were set, that is the time when the claim first accrued; a separate cause of action was not created by each monthly rental payment flowing from that original agreement. See, e.g., Air Transport Ass'n v. Lenkin, 711 F.Supp. 25, 27-28 (D.D.C. 1989), aff'd 899 F.2d 1265 (D.C. Cir. 1990). Any claim of an impermissible contribution resulting from below market rent, then, accrued at the time of determination of the rental rate, well over five years ago.

Even if a separate violation is deemed to have occurred with each monthly payment, the Commission may not lawfully look back as far as 1988 for allegedly below-market rental payments. Any conduct occurring more than five years before the FEC brings a civil action is barred. The D.C. courts have explicitly stated that FEC administrative proceedings do not toll the running of

the five-year period. See NRSC, 877 F.Supp. at 19-20 ("We can discern no reason why this process cannot be easily accomplished by the agency within the five year limitation in §2462, even with discovery and subpoena enforcement delays of many months or even years"); NRTWC, 916 F.Supp. at 13-14 ("If, as the FEC argues, a claim were not to "accrue" until the FEC formally and officially chose to act upon it at any stage, then a respondent could theoretically remain exposed to punishment in perpetuity . . ."); See also, 3M Co. v. Browner, 17 F.3d 1453, 1460-1463 (D.C. Cir. 1994). The Ninth Circuit, which declined to decide whether the FEC's administrative proceedings would toll the statute of limitations, suggested that if tolling did occur, the clock would stop for only the mandatory time periods set forth under 2 U.S.C. §437g(a). Williams, 1996 WL 734772 at *4. In the case at hand, this would mean only 30-90 days.

We believe this entire matter is time barred. But even if arguendo it is not, then, at a minimum, conduct prior to February 1992 is certainly time-barred. For claims as of February 1992 to be timely, the Commission would have to begin conciliation efforts now and the court would have to hold first, that separate violations occurred each month and second, that the conciliation period tolls the statute of limitations. In all likelihood, if the claim is not entirely time barred, the relevant period would begin after February 1992.

**III. There Is No Evidence the Space in Question Was
Used in Connection With Campaigns.**

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The Commission cites nothing to suggest that the space leased by Mr. Fasi at the Cultural Plaza was used "in connection with an election," as required under the statute. See 2 U.S.C. §441e. The lease agreement records Mr. Frank Fasi, not a campaign group, as the lessee. Our preliminary investigation has not revealed the presence of campaign signs at the space or people regularly coming or going, as one would expect for a campaign office. Fasi leased the space continuously for more than 15 years; since campaign offices are usually in existence for only a few months prior to an election, this fact alone suggests that the space was intended and used at least much of the time for some other purpose.

Publicly available sources indicate that Mr. Fasi ran for office three times in the time period that is potentially relevant, February 1992 to the present: he ran for Mayor of Honolulu in 1992, for Governor of Hawaii in 1994, and again for Mayor in 1996. He was elected in 1992, defeated in 1994, and eliminated in the mayoral primary in September 1996. Even if the Commission were able to prove that he used some of the space he leased in the Cultural Plaza from time to time for election-related purposes, he would have done so for only a few months in each of those years. Hence, even if there were an underpayment of rent within the limitations period, the amount involved must

be calculated solely on the basis of part of the space for a limited number of months during 1992, 1994, and 1996. And, again, it would be the Commission's burden to show that any contribution resulting from below market rent was in connection with an election.

IV. The Rental Amount Was Consistent With Market Rates for That Property and Was Not Campaign Contribution.

As set forth in the accompanying affidavit of Robert Hastings, a certified expert in real estate appraisal with particular expertise in the Honolulu area, the rent paid by Mr. Fasi was within the range of reasonable market rates for the space leased in the relevant time period. Attachment A, Affidavit of Robert Hastings at ¶ 20. The Cultural Plaza is not commercially desirable real estate. It is located in an economically depressed section of Honolulu that does not attract many tourists, and the commercial potential for tenants is very limited. Attachment A, Affidavit of Robert Hastings at ¶ 10. Additionally, the Cultural Plaza has suffered continual structural problems from its start. Attachment A, Affidavit of Robert Hastings at ¶ 11. For these reasons, the Commission's reference to the rates published by the Society of Industrial and Office Realtors ("SIOR") are grossly inapposite as the Cultural

Plaza would not qualify as either Class A or B real estate.^{1/}
Attachment A, Affidavit of Robert Hastings at ¶ 15.

The only appropriate comparison for the rental rate paid by Mr. Fasi is to the rates paid by other tenants of the Cultural Plaza located near him. Attachment A, Affidavit of Robert Hastings at ¶ 16. Mr. Fasi leased an interior space on the second floor of the Plaza facing a courtyard, away from the foot traffic of shoppers and the street. Attachment A, Affidavit of Robert Hastings at ¶ 17. The spaces in this area are the Plaza's least desirable commercial space and command the lowest rents. Attachment A, Affidavit of Robert Hastings at ¶ 17. The spaces adjacent to the space leased by Fasi, which are of comparable size to the space Fasi leased, are leased by cultural organizations. These tenants each pay very little, if any, rent. Attachment A, Affidavit of Robert Hastings at ¶ 18. In Mr. Hastings' expert opinion, an approximate market range for the space leased by Mr. Fasi in the period from 1992 to 1996 would be \$0.25 per square foot to \$0.75 per square foot per month. Attachment A, Affidavit of Robert Hastings at ¶ 20. The rent paid by Mr. Fasi is within this range.

^{1/} We also note that SIOR rates are not particularly accurate as they are determined on the basis of reports by landlords of rents paid, which often do not include relevant considerations such as free rent concessions and tenant improvement allowances that would reduce effective rent rates. Attachment A, Affidavit of Robert Hastings at ¶ 14.

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An additional factor to consider is local real estate conditions in Honolulu between 1992 and 1996. During that time, vacancy rates citywide increased dramatically due to widespread corporate downsizing paired with the completion of approximately 2,000,000 square feet of new, upscale office space in the downtown area. Attachment A, Affidavit of Robert Hastings at ¶ 19. The market rate, therefore, for undesirable space within a poorly constructed, off-the-beaten-track shopping plaza would have been very low indeed. Finally, one would imagine that for lessors of property in an economically depressed, marginalized area of town, the prospect of having a prominent official lease space in that property would be very desirable. The benefits to the lessors of having such a tenant -- the increased visibility, the potential for attracting other noteworthy tenants, the possibility of increased security in that area, etc. -- might not be measurable by the rent paid alone. With these factors considered as well, even rent that might otherwise appear to be sub-market may not be so.

V. Conclusion

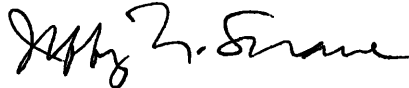
Because CAL has and had no ownership interest in the Cultural Plaza and exercised no influence or control over business or management decisions regarding the leasing of space therein, there is no basis for the Commission to attribute to CAL any liability for contributions resulting from alleged below-market leasing arrangements.

Further, the Commission's calculation that the rental of space to Mr. Fasi could amount to a violation of as much as \$312,000 (see December 6, 1996, letter from FEC to CAL at p. 7, n.6) is based on three faulty premises: first, that if the claim is not entirely time barred, the Commission could successfully raise alleged violations occurring before February 1992; second, that the entire space leased was used in connection with an election every month for an eight-year period; and third, that an SIOR "low" rate for property with good location, professional management, fairly high quality construction and tenants, and little functional obsolescence and deterioration (see FEC letter, note 5) is a reasonable guide to fair market rates for the least desirable space at the Cultural Plaza.

Even if the applicable statute of limitations were viewed most favorably to the Commission and the Commission could show that the rent was below market and that some of the space was used during some of the relevant time for election-related purposes, the amount involved in the alleged violation would be quite small. At most, it would be a small amount of monthly underpayment for some fraction of the space multiplied by a handful of months. And we submit that the facts and law involved would make even this very difficult to support.

For these reasons, the Commission should take no further action and close the file in this matter.

Sincerely,



Roger M. Witten
Jeffrey N. Shane
Margaret L. Ackerley

Counsel for Respondent,
China Airlines, Ltd.

21.04.402.4352



Attachment A

21-014-402-4346

AFFIDAVIT OF ROBERT C. HASTINGS, JR.

ROBERT C. HASTINGS, JR., being first duly sworn,
deposes and says:

1. My name is Robert C. Hastings, Jr.
2. I am the President of Hastings, Conboy, Braig and Associates, Ltd., Honolulu, Hawaii, one of the largest real estate consulting firms in the State of Hawaii.
3. I am a certified general appraiser. I have a designation from the American Society of Real Estate Counselors (CRE) and am a member of the Appraisal Institute (MAI).
4. I am a member of the Honolulu Board of Realtors and the National Association of Realtors and was past president of the Honolulu Chapter No. 15 of the American Institute of Real Estate Appraisers (now known as the Appraisal Institute).
5. I have taken and continue to take various valuation courses sponsored by the American Society of Real Estate Counselors and the Appraisal Institute and its two predecessor organizations, the American Institute of Real

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Estate Appraisers and the Society of Real Estate Appraisers.

6. I earned an MBA in Finance from the University of Arizona in 1965 and a Bachelor's Degree in Accounting from the University of Arizona, 1960.
7. I have published several papers regarding real estate appraisal, Hawaii's real estate industry, financial analysis for the appraiser, and real estate valuation. I have served as an expert witness in over 100 litigation matters involving real estate valuations.
8. My firm maintains an extensive technical library of books, monographs, journals and special statistical compilations in the fields of land use, recreation, investment analysis, urban planning and development, as well as constantly updated surveys of market conditions for a variety of land. In conjunction with being headquartered in Hawaii, these library resources allow the firm to closely monitor local real estate developments and activity. On an annual basis, the firm receives the operating statistics from approximately 60 office buildings and 26 shopping centers.

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9. I was retained by Wilmer, Cutler & Pickering in January 1997 to evaluate the fair market value of space leased by Mr. Frank Fasi at the Chinatown Cultural Plaza ("Cultural Plaza") beginning in 1992.
10. The Cultural Plaza is located in a tertiary commercial section of Honolulu. The area is economically depressed and does not attract many tourists. The commercial potential for tenants leasing there is very limited.
11. From its inception, the Cultural Plaza suffered continual structural problems.
12. The rents for spaces within the Cultural Plaza are very low when compared to market rents in downtown Honolulu.
13. Several tenants of the Cultural Plaza currently and historically have paid very low or effectively no rent for the space, such as the Sun Yat Sen School and other Chinese cultural concerns.
14. Rental rates published by the Society of Industrial and Office Realtors ("SIOR") are determined on the basis of reports by landlords of rents paid, which often do not include relevant

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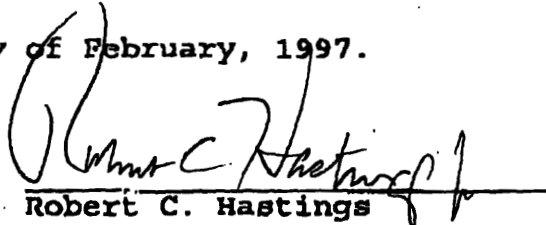
considerations such as free rent concessions and tenant improvement allowances that would reduce effective rent rates. For this and other reasons, SIOR rates are not particularly accurate indicators of actual leasing rates.

15. Under SIOR property classifications, the Cultural Plaza would not qualify as either Class A or B real estate.
16. The appropriate comparison for the rental rate paid by Mr. Fasi are the rates paid by other tenants of the Cultural Plaza located in the same general area of the Plaza.
17. Mr. Fasi leased an interior space on the second floor of the Cultural Plaza facing the courtyard, away from the foot traffic of shoppers and the street. The spaces in this area are the Plaza's least desirable commercial space and command the lowest rents.
18. The spaces adjacent to the space leased by Mr. Fasi, which are of comparable size to the space he leased, are occupied by cultural organizations. These tenants each pay very little, if any, rent.

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19. During the period 1992-1996, commercial vacancy rates in Honolulu increased dramatically due to the completion of approximately 2,000,000 square feet of new, upscale office space in the downtown area at the same time as a collapse in the economy created widespread corporate downsizing.
20. While it is impossible to say precisely what would constitute a fair market rate for the space leased by Mr. Fasi, given all the factors that would go into such a determination including the Cultural Plaza's difficulty leasing space in that area, my judgment is that an approximate market range for such a lease in the period from 1992 to 1996 would be \$0.25 per square foot to \$0.75 per square foot.

Executed this 13th day of February, 1997.


Robert C. Hastings

Subscribed and sworn to before me this 13th day of February, 1997.


Notary Public

my Commission Expires:
Oct 24, 2000

